A MEASURE OF HARMONY: THE ORCHESTRATION OF RULE 32(H) WITH THE "DISCORDANT SYMPHONY" OF *BOOKER*

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ABSTRACT

*Sentencing in the post-*Booker *world presents a variety of challenges and uncertainties for the courts, Congress, and the general public. This Note examines one such challenge, considering the difficulties surrounding Federal Rule of Criminal Procedure 32(h) in light of* Booker. *The Note develops the history of both Rule 32(h) and the* Booker *decision, analyzes changes and suggested amendments to Rule 32(h), and concludes that the conflict between Rule 32(h) and* Booker *can be easily resolved with slight alterations to the language of Rule 32(h).*

INTRODUCTION

The Supreme Court's decision in *United States v. Booker*,[1] which rendered the Federal Sentencing Guidelines advisory, heralded confusing changes in the federal sentencing system. As Justice Antonin Scalia anticipated, *Booker* gave rise to "a discordant symphony of different standards, varying from court to court and judge to judge."[2] Substantively, *Booker* starkly diverged from the sentencing regime previously established by Congress.[3] Procedurally, *Booker* complicated the sentencing system by failing to give lower

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1. United States v. Booker, 543 U.S. 220 (2005).
2. *Id.* at 312 (Scalia, J., dissenting).
3. *Id.* at 300 (Stevens, J., dissenting).

courts any idea of how much deference they should give the Guidelines and by failing to provide certain safety nets for defendants.[4] According to Justice Scalia, the majority's approach was "rather like deleting the ingredients portion of a recipe and telling the cook to proceed with the preparation portion."[5]

Although the *Booker* decision did not produce the mayhem and colossal disorder that many commentators predicted,[6] the Court nevertheless failed to establish a clear remedial sentencing system. Lower courts struggle not only to properly balance numerous requisite sentencing factors[7] but also with the judicial discretion *Booker* reintroduced. As a result of the courts' expanded interpretive leeway, circuit splits abound on post-*Booker* issues,[8] and *Booker* itself fails to articulate clear standards to resolve those issues.[9] "[A] set of overly complex and rigid rules . . . rendered advisory by a great judicial shock," the sentencing system now uncertainly depends on trial judges' adherence to the term "advisory" and subsequent appellate court policing.[10] Such post-*Booker* confusion requires judges, legal scholars, and Congress alike to hone the sentencing system to meet the critical standards of constitutionality, clarity, and consistency.[11] This refinement of federal sentencing requires deciphering and resolving the ambiguities of the *Booker* decision.

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4. *Id.* at 300–01.

5. *Id.* at 307 (Scalia, J., dissenting).

6. Hyperbole is common in descriptions of the Sentencing Guidelines and the impact of the *Booker* decision. *E.g.*, Kris Axtman, *Cases Test New Flexibility of Sentencing Guidelines*, CHRISTIAN SCI. MONITOR, Feb. 18, 2005, at 2 ("[F]iguring out what to do with all the cases that have been sentenced under the old guidelines is the closest thing to chaos you can describe." (quoting Professor Douglas Berman of the Ohio State University, Moritz College of Law)); Dan Eggen, *Ashcroft Defends Tough Policies*, WASH. POST, Feb. 2, 2005, at A2 (quoting Attorney General John Ashcroft describing the *Booker* opinion as "a retreat from justice that may put the public's safety in jeopardy"); Myron H. Thompson, Op-Ed., *Sentencing and Sensibility*, N.Y. TIMES, Jan. 21, 2005, at A23 (advocating increased judicial discretion by analogizing the strict sentencing guidelines to the extreme punishments imposed by the Athenian leader Draco).

7. *See Booker*, 543 U.S. at 264–65 (summarizing the role of the Guidelines and other statutory factors during sentencing).

8. *See* Rita v. United States, 127 S. Ct. 2459 (2007) (considering the circuit split involving the presumption of reasonableness of the Guidelines); United States v. Demaree, 459 F.3d 791 (7th Cir. 2006) (discussing the legality of different Guidelines versions and concluding that changes are not ex post facto laws).

9. David J. D'Addio, *Sentencing After* Booker*: The Impact of Appellate Review on Defendants' Rights*, 24 YALE L. & POL'Y REV. 173, 173 (2006).

10. Robert Weisberg & Marc L. Miller, *Sentencing Lessons*, 58 STAN. L. REV. 1, 27 (2005).

11. *See* Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 194 (2005) ("By encouraging meaningful appellate review and deploying other devices . . . to

One point of discord arising from *Booker* involves Federal Rule of Criminal Procedure 32(h). Rule 32(h), entitled "Notice of Possible Departure from Sentencing Guidelines," provides:

> Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.[12]

Rule 32(h) requires a court to provide fair notice to parties when considering a departure from the Sentencing Guidelines.[13] The *Booker* Court's decision to make the Guidelines advisory, however, seemingly renders Rule 32(h) valueless.[14] Why would a defendant need notice of a departure from Guidelines that are only advisory and not mandatory in nature? Should a defendant really expect a sentence to fall within the purely advisory Guidelines? In practice, courts' answers to these questions have been anything but consistent.

Rule 32(h) provides an ideal lens through which to view some of the dilemmas in the post-*Booker* world of sentencing. The very existence of Rule 32(h), after *Booker*, has caused a circuit split[15] with further uncertainty surrounding the appropriate amount and timing of notice that must be provided to parties under Rule 32(h). Consequently, the Advisory Committee on the Federal Rules of Criminal Procedure has drafted a new version of Rule 32(h), conforming to the *Booker* requirements.[16] Under the heading of

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promote a richer sentencing discourse, Congress can continue to move the federal sentencing system forward.").

12. FED. R. CRIM. P. 32(h).

13. *See* Burns v. United States, 501 U.S. 129, 138 (1991) (holding that a district court may not upwardly depart from the Sentencing Guidelines range without first notifying the parties of its intent to depart).

14. *See, e.g.*, United States v. Vampire Nation, 451 F.3d 189, 196 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 424 (2006) ("Application of the advance notice requirement of Rule 32(h) to discretionary sentenc[ing] would elevate the advisory sentencing range to a position of importance that it no longer can enjoy.").

15. *Compare id.* at 197 (not requiring a notice requirement for variances from Guidelines sentences), *with* United States v. Davenport, 445 F.3d 366, 371 (4th Cir. 2006) (keeping the notice requirement of Rule 32(h) even under an advisory Guidelines system).

16. FED. R. CRIM. P. 32(h) (Preliminary Draft of Proposed Amendment 2005), *available at* http://www.uscourts.gov/rules/Rules_Publication_August_2005.pdf#page=150. The Advisory Committee, composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice, assists in coordinating and drafting

"Notice of Intent to Consider Other Sentencing Factors," the Advisory Committee suggested:

> Before the court may rely on a ground not identified either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence. The notice must specify any ground not earlier identified on which the court is contemplating a departure or a non-guideline sentence.[17]

The proposed adjustments have progressed through various channels of the amendment process, so far yielding little actual procedural change. Nevertheless, the proposed amendments have generated additional considerations for Rule 32(h) and have illustrated the advantages of gradual, thoughtful fine-tuning of federal sentencing.[18]

By integrating constitutionality, clarity, and reasonableness, proposed Rule 32(h) presents a rare accord within the convoluted world of post-*Booker* sentencing. Part I of this Note explores the emergence and current status of Rule 32(h) and *Booker* to appropriately contextualize the conflict between the rule of procedure and the rule of the Court. Part II then illuminates the apparent conflict between Rule 32(h) and *Booker*. This discussion sets the stage for Part III, which explains the value and legitimacy of proposed Rule 32(h) as a suitable compromise for courts, legislators, and the public.

I. ARRANGING RULE 32(H) AND *BOOKER*

Viewing the background and confusion associated with *Booker* through the lens of Rule 32(h) helps elucidate the functioning of both Rule 32(h) and the *Booker* decision. Understanding the conflict between Rule 32(h) and *Booker* requires tracing the chronological development of the Federal Sentencing Guidelines, Rule 32(h), and the *Booker* decision.

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appropriate amendments to rules and explanatory committee notes. For a more complete explanation of the federal rulemaking process, and to see exactly how the Advisory Committee fits into the scheme of rulemaking, see The Rulemaking Process: *A Summary for the Bench and Bar* October 2007, http://www.uscourts.gov/rules/proceduresum.htm (last visited Oct. 5, 2007).

17. FED. R. CRIM. P. 32(h) (Preliminary Draft of Proposed Amendment 2005), *available at* http://www.uscourts.gov/rules/Rules_Publication_August_2005.pdf#page=150.

18. *See infra* Part II.B (discussing the airing of appropriate issues pertaining to Rule 32(h)).

A. The Guidelines

Prior to both Rule 32(h) and *Booker*, increasing crime rates in the 1970s and 1980s generated an alliance between conservatives and liberals, resulting in the passage of the Sentencing Reform Act of 1984 (SRA).[19] The SRA created the Sentencing Commission, and Congress charged the Commission with three goals: (1) meeting the SRA's sentencing purposes, (2) providing certainty and fairness in sentencing by avoiding unwarranted disparities among defendants with similar records, and (3) reflecting the advancement in the knowledge of human behavior as it relates to the criminal justice process.[20] The Sentencing Commission developed the Sentencing Guidelines, which prescribed more uniform sentencing ranges for similarly situated offenders.[21] Using a grid of narrow sentencing ranges, the Guidelines coordinate an offense with offender characteristics to establish sentencing requirements and options.[22] Adopted in 1987, the Sentencing Guidelines represented "a watershed in legal history."[23]

B. The Emergence of Rule 32(h)

Rule 32(h) emerged in response to the Supreme Court's 1991 decision in *Burns v. United States*.[24] The *Burns* Court required prior notification to both parties if a court intended to upwardly depart from a range mandated by the Sentencing Guidelines.[25] Though, at the time of the *Burns* decision, Rule 32 "contain[ed] no express language requiring a district court to notify the parties of its intent to make *sua sponte* departures from the Guidelines,"[26] the Court nevertheless construed Rule 32 to require notice of any consideration of an upward departure from the mandatory Guidelines range.[27] The

19. Gilles R. Bissonnette, Comment, *"Consulting" the Federal Sentencing Guidelines after* Booker, 53 UCLA L. REV. 1497, 1504 (2006).

20. Sentencing Reform Act, 28 U.S.C. § 991(b)(1) (2000); *see also* Mistretta v. United States, 488 U.S. 361, 374 (1989) (construing the SRA).

21. 3 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 526.1 (3d ed. 2000).

22. *Id.*

23. Bissonnette, *supra* note 19, at 1506.

24. Burns v. United States, 501 U.S. 129 (1991).

25. *Id.* at 138–39.

26. *Id.* at 132.

27. *Id.* at 136–37.

Court based its decision on the need for "full adversary testing of the issues relevant to a Guidelines sentence."[28] Noting that "[n]ot every silence is pregnant,"[29] the Court determined that "Congress did not intend district courts to depart from the Guidelines *sua sponte* without first affording notice to the parties."[30] Subsequently, Congress added Rule 32(h), entitled "Notice of Possible Departure from Sentencing Guidelines," to codify the Court's decision in *Burns*.[31]

C. The United States v. Booker *Segue*

In 2005, the *Booker* opinion addressed the constitutionality of the Sentencing Guidelines. *Booker* combined the cases of Freddie J. Booker and Ducan Fanfan to consider "whether an application of the Federal Sentencing Guidelines violated the Sixth Amendment."[32] A judicial finding that Booker obstructed justice increased his sentence for drug possession with intent to distribute from twenty-one years and ten months to thirty years.[33] The judge in Fanfan's drug possession case, on the other hand, refused to "make 'any blanket decision about the federal guidelines.'"[34] Instead, the judge based Fanfan's sentence "solely upon the guilty verdict" in the case.[35]

In unusual fashion, the *Booker* Court issued two seemingly disparate 5–4 opinions by two very different majorities.[36] In the first *Booker* opinion (*Booker I*) Justice Stevens wrote for the majority and

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28. *Id.* at 135.

29. *Id.* at 136 (quoting Ill., Dep't of Pub. Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983)).

30. *Id.* at 136.

31. FED. R. CRIM. P. 32(h) advisory committee's note (indicating that Rule 32(h) reflected the *Burns* decision by requiring notice of the specific grounds of a Guidelines departure before a sentencing court could depart).

32. United States v. Booker, 543 U.S. 220, 226 (2005).

33. *Id.* at 227.

34. *Id.* at 229 (quoting Appendix A to Petition for Writ of Certiorari at 11a, *Booker*, 543 U.S. 220 (No. 04-105)).

35. *Id.* (quoting Appendix A to Petition for Writ of Certiorari at 11a, *Booker*, 543 U.S. 220 (No. 04-105)).

36. In the first majority opinion of *Booker*, Justice Stevens, Justice Scalia, Justice Souter, Justice Thomas, and Justice Ginsburg comprised the majority. *Id.* at 226. The dissenters, however, from the first majority opinion embraced the second majority opinion. Justice Breyer, Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, and Justice Ginsburg all agreed with the second remedial majority. *Id.* at 244. Justice Ginsburg, the only justice in both majorities of *Booker*, did not write to explain her decision.

followed the Court's budding Sixth Amendment jurisprudence.[37] The Court applied the Sixth Amendment to the sentencing enhancements in the Federal Sentencing Guidelines,[38] holding that any sentencing enhancements based on facts not found beyond a reasonable doubt by a jury were unconstitutional.[39] The Court stated that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[40] *Booker I* came as no great surprise in the legal world because it grew "directly out of a similar conclusion the same five justices . . . reached . . . in invalidating the sentencing guidelines system in the state of Washington."[41]

Writing for the majority in the second *Booker* opinion (*Booker II*), Justice Breyer attempted to remedy the constitutional flaws in the Sentencing Guidelines. *Booker II* rendered the Guidelines advisory rather than mandatory.[42] The *Booker II* majority excised the mandatory portions of the Guidelines,[43] required that the newly expurgated Guidelines be considered as a factor during sentencing,[44] and checked the newly fashioned judicial discretion in sentencing by placing a standard of reasonableness review on appellate courts.[45] More specifically, the Justices in *Booker II* concluded that Congress would have preferred removing the certain mandatory portions of the Guidelines that violated the Sixth Amendment instead of invalidating the entire Sentencing Guidelines Act.[46] To comply with this prediction

37. *Booker*, 543 U.S. at 238, 243–44; *cf.* Blakely v. Washington, 542 U.S. 296, 305–06 (2004) (considering the constitutionality of the Washington State Sentencing Guidelines and holding that "[o]ur commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (distinguishing sentencing facts from elements of the offense and holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

38. *Booker*, 543 U.S. at 229.

39. *Id.* at 244.

40. *Id.*

41. Linda Greenhouse, *Supreme Court Transforms Use of Sentence Guidelines*, N.Y. TIMES, Jan. 13, 2005, at A1.

42. *Booker*, 543 U.S. at 245–46.

43. *Id.* at 259.

44. *Id.* at 264.

45. *Id.*

46. *Id.* at 249.

of congressional will, the Court elected to "sever and excise two specific statutory provisions: the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range . . . and the provision that sets forth standards of review on appeal."[47] The Court also selected a reasonableness standard of review for sentencing considerations at the appellate level, specifying that § 3553(a), which enumerates the factors that influence sentencing, serve as the guide for the appellate reasonableness standard.[48] In what amounted to a "remarkable act of judicial jujitsu,"[49] Justice Breyer, seeking to protect the essential pre-*Booker* aspects of sentencing, raised a firestorm of criticisms and questions.[50] As one commentator remarked, "the remedy," *Booker II*, "was the surprise . . . that will shape the continuing debate over sentencing policy."[51]

D. The Current Tempo of Booker

Booker prompted a variety of reactions from an abundance of sources. On the judicial front, *Booker* propelled the federal courts into uncertainty and transformed the federal sentencing process.[52] "U.S. judges across the country are struggling to navigate their newfound discretion amid thousands of appeals, widespread confusion and sharp scrutiny from critics who are on guard for soft punishments."[53] Many courts continue to adhere to Guidelines recommendations. For instance, the Fourth, Fifth, Sixth, Seventh,

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47. *Id.* at 259.

48. *Id.* at 261. The statute indicates:

> Factors to be considered in imposing a sentence [include] . . . (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed . . . ; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for[] (A) the applicable category of offense . . . ; (5) any pertinent policy statement . . . ; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2000).

49. Charlie Savage, *High Court Overturns Sentencing Guidelines but Ruling Will Allow Advisory Use by Judges*, BOSTON GLOBE, Jan. 13, 2005, at A1 (quoting Professor Frank Bowman of the Indiana University School of Law-Indianapolis).

50. *See* Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 346 n.16 (2006) ("Many commentators have noted the apparent conceptual confusions in the *Booker* opinions.").

51. Greenhouse, *supra* note 41.

52. *Id.*

53. Gail Gibson, *Judges Left in Confusion on Sentencing*, BALT. SUN, Feb. 13, 2005, at 1A.

Eighth, and Tenth Circuits have all applied the presumption of reasonableness to sentences within Guidelines ranges, giving the Guidelines significant weight as sentencing factors.[54] At the district court level, some judges also feel obliged to adhere to the Guidelines. A Nebraska district court judge resolved "that the Guidelines must be given substantial weight even though they are now advisory. To do otherwise is to thumb our judicial noses at Congress."[55]

On the other side of the coin, some courts hesitate to apply the presumption of reasonableness to the Guidelines. The Second Circuit, for instance, has expressly rejected the presumptive reasonableness of Guidelines sentences.[56] District of Massachusetts Judge Nancy Gertner, likewise, embraced the judicial flexibility that *Booker* provided because she "[s]o many times . . . found [herself] in a situation where the guideline sentence made no sense in light of the facts."[57]

The Supreme Court has allowed but has not mandated the presumptive reasonableness approach to Guidelines sentences. In *Rita v. United States*,[58] Victor Rita argued that although his sentence fell within the Guidelines range, it did not adequately account for his history and characteristics and did not comply with the sentencing purposes of 18 U.S.C. § 3553(a).[59] The Court, however, upheld the Fourth Circuit's presumption of reasonableness, stating that "a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines."[60] Relying on the nonbinding nature of the presumption and the congressional goals set forth by the Sentencing Guidelines Act, the Court held that the presumption of reasonableness reflects a proper balance between deference to the district court and to the Sentencing Commission.[61] The Court also emphasized that "the

54. Bissonnette, *supra* note 19, at 1523.

55. United States v. Wanning, 354 F. Supp. 2d 1056, 1062 (D. Neb. 2005).

56. *See* United States v. Fernandez, 443 F.3d 19, 21 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 192 (2006) ("We therefore decline to establish any presumption, rebuttable or otherwise, that a Guidelines sentence is reasonable.").

57. Shelley Murphy, *2 Boston Jurists Hail Return of Discretion*, BOSTON GLOBE, Jan. 13, 2005, at A20 (quoting Judge Nancy Gertner).

58. Rita v. United States, 127 S. Ct. 2456 (2007).

59. *Id.* at 2462.

60. *Id.*

61. *See id.* at 2465 ("[T]he courts of appeals' 'reasonableness' presumption, rather than having independent legal effect, simply recognizes the real-world circumstance that when the

presumption . . . is an *appellate* court presumption. . . . Thus, the sentencing court subjects the defendant's sentence to thorough adversarial testing contemplated by federal sentencing procedure."[62]

Although the Supreme Court's support for the Fourth Circuit presumption of reasonableness for Guidelines sentencing in *Rita* offers some insight into the Court's treatment of the Guidelines, considerable portions of the post-*Booker* sentencing regime still confound lower courts. *Rita*'s consideration of the presumption of reasonableness debate did not settle the judicial disagreements associated with the Court's failure in *Booker* to describe precisely how trial courts should employ the Guidelines.[63]

Looking beyond the judiciary, the *Booker* decision, by markedly changing the federal sentencing system, sparked sundry responses by legislators. Although some congressional leaders, shortly after the *Booker* decision, braced for a fight over how much discretion should be provided to federal judges,[64] others advocated restraint from hasty legislative maneuvers that might further complicate an already opaque system.[65] Senate Judiciary Committee Chairman Arlen Specter commented that he intended "to thoroughly review the Supreme Court's decision and work to establish a sentencing method that will be appropriately tough on career criminals, fair, and consistent with constitutional requirements."[66] Senator Ted Kennedy, however, warned against "rash action by Congress to impose a mandatory sentencing regime" to allow a federal sentencing commission time to recommend reforms.[67]

Public responses to *Booker* also varied in substance and source. With the Department of Justice scrambling to preserve the remaining authority of the Guidelines, other legal scholars, criminal defense attorneys, and critics decried the confusion over the Guidelines and

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judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) in the mine run of cases, it is probable that the sentence is reasonable.").

62. *Id.*

63. *See id.* at 2475 (Scalia, J., concurring) ("[P]recisely what 'reasonableness' review entails is not dictated by *Booker*. . . . The Court has reintroduced the constitutional defect that *Booker* purported to eliminate. . . . [W]e should have left in place the compulsory Guidelines that Congress enacted, instead of imposing this jerry-rigged scheme of our own."); Bissonnette, *supra* note 19, at 1500.

64. Greenhouse, *supra* note 41.

65. Savage, *supra* note 49.

66. *Id.*

67. *Id.*

Booker's effects. Attorney General Alberto Gonzalez called on judges to adhere to uniform sentences, stating, "More and more frequently, judges are exercising their discretion to impose sentences that depart from the carefully considered ranges developed by the U.S. Sentencing Commission."[68] Jon Sands, chairman of the Federal Defender Guideline Committee, called the *Booker* opinion "bittersweet,"[69] stating that "the Sixth Amendment was vindicated, but then it was undercut again, all in one day."[70] On the other hand, Harvard Law School Professor William Stuntz commented, "[I]n its own strange, two-part way, *Booker* gets us to a good result. It may lead us as close to an ideal system as we may ever get—rules moderated by mercy."[71] Sentencing expert, Professor Doug Berman conceded, though, that sorting through the post-*Booker* issues requires time and patience in the lower courts.[72]

E. The Current Tempo of Rule 32(h)

Following the *Booker* decision, questions concerning the potential abolishment or amendment of Rule 32(h) began to circulate. The Advisory Committee on the Federal Rules of Criminal Procedure, the first channel in effecting changes to the Criminal Rules, considered the possible application of Rule 32(h) in light of *Booker*.[73] The Advisory Committee utilized a subcommittee specifically designed to analyze the impact of *Booker* on the Criminal Rules,[74] and "the Subcommittee . . . discussed whether it might be advisable to delete Rule 32(h) in its entirety but . . . ultimately decided to leave it in . . . ."[75] The Advisory Committee adopted one

68. Alexis Grant, *Attorney General Pushing for Harsher Sentences*, HOUSTON CHRON., June 22, 2005, at A5.

69. Kristina Walter, Note, Booker *and Our* Brave New World*: The Tension Among the Federal Sentencing Guidelines, Judicial Discretion, and a Defendant's Constitutional Right to Trial by Jury*, 53 CLEV. ST. L. REV. 657, 673 (2005) (quoting Telephone Interview by Mary Price, Families Against Mandatory Minimum, with Jon Sands, Chairman, Fed. Defender Guideline Comm. (Jan. 12, 2005)).

70. *Id.*

71. Lynn Adelman & Jon Deitrich, *Fulfilling* Booker*'s Promise*, 11 ROGER WILLIAMS U. L. REV. 521, 521 (quoting Robb London, *Aftermath*, HARV. L. BULL., Summer 2005, at 6).

72. Axtman, *supra* note 6, at 2.

73. Judicial Conference of the United States, Minutes of the Advisory Committee on Federal Rules of Criminal Procedure, at 5 (Apr. 4–5, 2005), *available at* http://www.uscourts.gov/rules/Minutes/CR04-2005-min.pdf; *see supra* note 16 (discussing the rulemaking process).

74. *Id.* at 4.

75. *Id.* at 5.

amended version of Rule 32(h),[76] which received public comments.[77] In April 2006, responding to concerns, the Committee slightly amended the language of its proposed draft, unanimously adopting more specific terminology suggested by the Sentencing Commission.[78] After this alteration, the proposed Rule 32(h), entitled "Notice of Intent to Consider Other Sentencing Factors," stated:

> Before the court may rely on a ground not identified *for departure or a non-guidelines sentence* either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence. *The notice must specify any ground not earlier identified for departing or imposing a non-guideline sentence on which the court is contemplating imposing such a sentence.*[79]

Despite the Advisory Committee's April 2006 modification, the Standing Committee hesitated to approve the rule, given the "fluid" state of the developing caselaw.[80] In June 2006, it sent the proposed amendment back to the Advisory Committee,[81] which agreed by a 7–4 vote at its October 2006 meeting to further consider Rule 32(h).[82] The Advisory Committee identified four areas of focus for the

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76. "[T]he Subcommittee had proposed two alternatives: The first version would make a distinction between 'variances' and 'departures.' The second version would make no distinction. . . . [T]he Committee decided to use the first alternative, with some minor changes, which included using the term 'non-guideline sentence' instead of the term 'variance.'" *Id.*

77. *See* ADMIN. OFFICE OF THE U.S. COURTS, 2005 CRIMINAL RULES COMMENTS CHART, http://www.uscourts.gov/rules/CR%20Rules%202005.htm (last visited Sept. 17, 2007) (listing the public comments for all 2005 Criminal Rules and specifying those applying to Rule 32).

78. *See* Report from Susan C. Bucklew, Chair, Advisory Comm. on Fed. Rules of Criminal Procedure, to David F. Levi, Chair, Comm. on Rules of Practice & Procedure 3–4 (May 20, 2006), *available at* http://www.uscourts.gov/rules/Reports/CR05-2006.pdf (detailing the adoption of the Sentencing Commission's suggested language for Rule 32(h)).

79. Judicial Conference of the United States, Minutes of the Advisory Committee on Federal Rules of Criminal Procedure, at 6 (Apr. 3–4, 2006), *available at* http://www.uscourts.gov/rules/Minutes/CR04-2006-min.pdf; Letter from Judith W. Sheon, Staff Dir., U.S. Sentencing Comm'n, to David F. Levi, Chair, Comm. on Rules of Practice & Procedure 2–3 (Feb. 15, 2006) (emphasis in original to denote proposed changes to Rule 32(h)), *available at* http://www.uscourts.gov/rules/CR%20Comments%202005/05-CR-017.pdf.

80. Judicial Conference of the United States, Minutes of the Committee on Rules of Practice and Procedure, at 25–27 (June 22–23, 2006), *available at* http://www.uscourts.gov/rules/Minutes/ST06-2006.pdf.

81. *Id.* at 26–27.

82. Report from Susan C. Bucklew, Chair, Advisory Comm. on Fed. Rules of Criminal Procedure, to David F. Levi, Chair, Comm. on Rules of Practice & Procedure 2–3 (Dec. 18, 2006), *available at* http://www.uscourts.gov/rules/Reports/CR12-2006.pdf.

reexamination: (1) the relationship between the Guidelines and other sentencing factors, (2) the requirement of notice by due process, (3) the meaning of adequate notice, and (4) specific cases given attention by the Federal Defenders.[83] Rule 32(h) has remained in a somewhat indeterminate state, subject to the multiplicity of steps and safeguards in the amendment process for the Criminal Rules.

II. DISSONANCE

The inconsistencies between Rule 32(h) and *Booker* have spawned disagreement among the federal courts of appeals, the drafters of the Federal Rules of Criminal Procedure, and the public. Understanding this dissonance surrounding Rule 32(h) is vital to ascertaining its significance within the world of sentencing.

A. The Courts Not in Tune

The circuits have split on the post-*Booker* role of Rule 32(h). On one hand, the Second, Fourth, Ninth, and Tenth Circuits have applied Rule 32(h) to all non-Guidelines sentences since *Booker*.[84] On the other hand, the Third, Seventh, and Eighth Circuits have determined that Rule 32(h) has no real effect in light of the *Booker* holding that rendered the Guidelines advisory.[85]

Favoring the notice provided by Rule 32(h), the Fourth Circuit held, in *United States v. Davenport*,[86] that "notice of an intent to depart or vary from the guidelines remains a critical part of sentencing post-*Booker*."[87] Sentenced to ten years imprisonment for fraudulently using a credit card, Davenport appealed his sentence as unreasonable.[88] For a number of reasons, including the district court's failure to provide notice of its contemplation of a sentence above the advisory guideline range, the appellate court vacated Davenport's sentence.[89] The Fourth Circuit clarified its position on Rule 32(h), stating:

83. *Id.*
84. *See* United States v. Anati, 457 F.3d 233, 236 (2d Cir. 2006) (detailing the circuit split).
85. *Id.*
86. United States v. Davenport, 445 F.3d 366 (4th Cir. 2006).
87. *Id.* at 371.
88. *Id.* at 367.
89. *Id.* at 374.

> The need for . . . notice is as clear now as before *Booker*. There is "essentially no limit on the number of potential factors that may warrant a departure" or a variance, and neither the defendant nor the Government "is in a position to guess when or on what grounds a district court might depart" or vary from the guidelines.[90]

Likewise, the Ninth Circuit held in *United States v. Evans-Martinez*[91] that Criminal Rule 32(h) survived *Booker*.[92] The court stated that "[t]he district court's plain error in failing to provide notice of its intent to sentence above the Guideline range 'seriously affect[ed] the fairness, integrity, or public reputation' of the sentencing proceeding."[93] The First, Second, and Tenth Circuits have also demonstrated support for the post-*Booker* application of Rule 32(h).[94]

Conversely, the Third Circuit, in considering Frederick Banks's sentence for selling illegally copied versions of Microsoft software products, firmly concluded, "[T]he District Court . . . was not obligated to provide advance notice of its intent to vary from . . . [the] Guidelines sentencing range."[95] In *United States v. Walker*,[96] the Seventh Circuit correspondingly held that "[t]he element of unfair surprise that underlay *Burns* and led to the creation of Rule 32(h) is no longer present."[97] Thus, the court refused to vacate the defendant's district court sentence.[98] Because the district court departed from

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90. *Id.* at 371 (quoting Burns v. United States, 501 U.S. 129, 136–37 (1991)).

91. United States v. Evans-Martinez, 448 F.3d 1163 (9th Cir. 2006).

92. *Id.* at 1164.

93. *Id.* at 1167 (quoting United States v. Ameline, 409 F.3d 1073, 1078 (9th Cir. 2005)).

94. *See* United States v. Wallace, 461 F.3d 15, 29 (1st Cir. 2006) ("[A]s this case illustrates, it is clearly the better practice—whether or not the legal requirement survives *Booker*—for the court to provide notice to defendants when relying on departure provisions in the advisory guidelines not previously identified . . . ."); United States v. Anati, 457 F.3d 233, 237 (2d Cir. 2006) ("The existence of the calculated Guidelines range as the starting point for either type of sentence makes the *Burns* rationale as appropriate for a non-Guidelines sentence as for a departure."); United States v. Dozier, 444 F.3d 1215, 1218 (10th Cir. 2006) ("We do not question the viability of Rule 32(h) and *Burns* after *Booker*.").

95. United States v. Vampire Nation, 451 F.3d 189, 192 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 424 (2006).

96. United States v. Walker, 447 F.3d 999 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 314 (2006).

97. *Id.* at 1007–08. *But see* United States v. Sharp, 436 F.3d 730, 734–35 (7th Cir. 2006) (holding that "if the [presentence report] or the prosecutor's recommendation does not identify the basis for the potential sentencing increase, then 'the Judge must inform the defendant, a sufficient time in advance of sentencing (i.e. [sic] not during the actual sentencing), of the specific grounds that the court is considering relying on to increase the terms of confinement.'" (quoting United States v. Jackson, 32 F.3d 1101, 1108 (7th Cir. 1994))).

98. *Walker*, 447 F.3d at 1007–08.

advisory Guidelines, the Seventh Circuit included Rule 32(h) in the extended sentencing discretion of *Booker*.[99] The Eighth and Eleventh Circuits reached comparable conclusions.[100]

The amount of notice required by Rule 32(h) has fostered further disagreement. By refusing to answer questions regarding the amount and timing of notice, the *Burns* Court set the tone for uncertainty among the appellate courts on the subject.[101] Most courts agree that information in the presentence report (PSR) or prehearing submission satisfies the notice requirement of existing Rule 32(h).[102] Doubt, however, may arise on the actual amount and timing of notice required when a court considers a sentence outside a calculated Guidelines range. Is informing a defendant at a sentencing hearing sufficient, or is prior notice required? If prior notice is required, how much prior notice is sufficient? The circuit courts have not issued any bright-line rules concerning the amount or timing of proper notice. Though some courts have pronounced certain information, like that contained in the PSR or prehearing submission, as satisfying requirements for appropriate timing and notice, by and large, the circuit courts do not venture beyond the precise situations presented. In fact, most circuits simply state a reasonableness standard, like that of the Fifth Circuit, which provides for "reasonable notice . . . on a ground not identified for departure in either the presentence report or in a party's prehearing submission."[103] The Second Circuit also generally requires "prior notice . . . [that] will facilitate a defendant's opportunity to contest the factual premises of the sentencing judge's view."[104] The circuit courts primarily determine the reasonableness of

99. *Id.* at 1007.

100. United States v. Simmerer, 156 F. App'x 124, 128 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 1599 (2006) ("There is no precedent from this court or from the Supreme Court establishing that Fed. R. Crim. P. 32 applies to a post-*Booker* upward variance."); United States v. Egenberger, 424 F.3d 803, 806 (8th Cir. 2005) ("This is not a case where the defendant was entitled to notice that the court, in its Sentencing Guidelines calculations, was contemplating an upward departure . . . .").

101. Burns v. United States, 501 U.S. 129, 139 (1991).

102. *See, e.g.*, United States v. Wallace, 461 F.3d 15, 44 n.14 (1st Cir. 2006) ("[I]t is clearly the better practice . . . for the court to provide notice to defendants when relying on departure provisions in the advisory guidelines not previously identified in the PSR or in a party's prehearing submission."); United States v. Allison, 447 F.3d 402, 406 (5th Cir. 2006) ("We have consistently held that the notice requirement may be satisfied by information in the PSR.").

103. *Allison*, 447 F.3d at 406.

104. United States v. Anati, 457 F.3d 233, 238 (2d Cir. 2006).

notice provided but do not illustrate specifics of sufficient notice and sufficient timing of notice.

B. The Cadence of the Drafters and the Public

Disagreement over Rule 32(h) has not ended with the courts. The Advisory Committee's consideration of proposed Rule 32(h) introduced several matters for deliberation. Following the Advisory Committee's proposal for a revised, post-*Booker* Rule 32(h), the Committee received various public comments regarding the predominance of the Guidelines; the use of certain terminology in the proposed rule; and potentially undesirable consequences from the proposed rule, like procedural complications and extra court costs.[105]

Public opinion regarding the proposed rule principally has focused on the primacy of the Guidelines and the use of outdated terminology. For instance, Chief U.S. Probation Officer Tony Garoppolo wrote, "This proposal effectively gives primacy to the sentencing guidelines as a factor for the Court to consider in sentencing, but neither Section 3553(a) or *Booker* give the guidelines such primacy."[106] Even the National Association of Criminal Defense Lawyers (NACDL), which wholeheartedly supported the continued applicability of Rule 32(h) once it appropriately conformed with *Booker*, conceded, "[T]he proposed amendment simply substitutes new language that perpetuates the primacy of the guidelines . . . ."[107] Federal Public Defender Jon M. Sands, however, countered the concern over Guidelines primacy with a statement about the reality of sentencing, noting that "[o]f all of the statutory factors courts must now consider, only the guideline range has a number attached to it. Thus, whether treated as advisory or presumptive, the guidelines continue to be the single most determinative factor of a defendant's sentence length."[108] The formulation of Criminal Rule 32(h) and

105. *See supra* note 77 (indicating the public comments).

106. Letter from Tony Garoppolo, Chief U.S. Prob. Officer, to Comm. on Rules of Practice & Procedure (Oct. 19, 2005), *available at* http://www.uscourts.gov/rules/CR%20Comments%202005/05-CR-002.pdf [hereinafter Garoppolo Letter].

107. Letter from William J. Genego & Peter Goldberger, Co-Chairs, Nat'l Ass'n of Criminal Def. Lawyers Comm. on Rules of Procedure, to Peter G. McCabe, Sec'y, Standing Comm. on Rules of Practice & Procedure 5 (Feb. 15, 2006), *available at* http://www.uscourts.gov/rules/CR%20Comments%202005/05-CR-020.pdf [hereinafter NACDL Letter].

108. Letter from Jon M. Sands, Fed. Pub. Defender, to Peter G. McGabe, Comm. on Rules of Practice & Procedure 1 (Oct. 23, 2006) (on file with the *Duke Law Journal*) [hereinafter Sands Letter].

public comments surrounding it illustrate the ongoing debate over the primacy of the Guidelines.

Drafting a post-*Booker* version of Rule 32(h) also has involved a difference of opinion over certain terminology. Some courts of appeals distinguish between the treatment of a departure and the treatment of a variance.[109] To clarify the distinction, a departure is a sentence *both* outside of the Guidelines range and outside of the § 3553(a) sentencing factors. A variance is a sentence outside of the Guidelines range *but* within the discretion of the § 3553(a) factors and *Booker*. This distinction between departures and variances led the Advisory Committee to consider two possibilities in drafting proposed Rule 32(h), one including a lingual distinction and one abandoning the differentiation between variance and departure. The Committee adopted a distinction for the draft of Rule 32(h), using the terms "departure" and, in place of variance, "non-guideline sentence."[110] The Committee's choice failed to please the public fully. Chief Probation Officer Garoppolo expressed concern over the outdated nature of the term "departure,"[111] and the NACDL communicated dissatisfaction with "[r]eferences to a court's engaging in the act of 'departing' and references to 'the applicable guideline range' and to a 'non-guideline sentence.'"[112] The NACDL felt that these references were unnecessary to conform Rule 32(h) to the requirements of *Booker* and that continued use of such terms impeded the transformation to post-*Booker* sentencing, which revolves around all factors of § 3553(a).[113]

Finally, the proposed version of Rule 32(h) has aroused apprehensions regarding potential procedural complications and costs associated with unnecessary court time. Judge Stewart Dalzell pointed out that the proposed version of Rule 32(h) "assures that many, if not most, sentencing hearings will have to take place at least twice, with consequent costs to the parties, victims, and public who all

109. *See, e.g.*, United States v. Vampire Nation, 451 F.3d 189, 197–98 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 424 (2006) (holding that a variance is not subject to a notice requirement, but "if a court is contemplating a departure, it should continue to give notice as it did before *Booker*").

110. *See supra* Part I.E (detailing the Advisory Committee's choices for Rule 32(h)).

111. Garoppolo Letter, *supra* note 106.

112. NACDL Letter, *supra* note 107, at 5.

113. *Id.; see supra* note 48 (listing the § 3553(a) factors for sentencing).

have a right to attend such important proceedings."[114] The judge noted that some considerations of § 3553(a), such as a defendant's remorse, are not discernable until the sentencing hearing.[115] Thus, notice of consideration of an outside-Guidelines sentence, which includes both departures and variances, based on these later matters could only take place at the sentencing hearing.[116] Notice would then necessitate a subsequent hearing, complicating the court's schedule.[117]

Rule 32(h) must therefore be viewed amidst circuit court, Committee, and public disagreements. These discrepancies form the analytical foundation for consideration of Rule 32(h).

III. THE RIGHT HARMONY

The process of criminal sentencing constantly evolves, influenced by a plethora of factors and contributors both inside and outside the courtroom.[118] "Especially after *United States v. Booker*, sentencing is an art, not a science."[119] Contemplated as an art form, sentencing inexorably involves "a veritable parade of actors, including legislators, sentencing commissioners, police officers, prosecutors, juries, trial judges, appellate judges, and executive branch officials."[120] The Supreme Court maintains that different branches of the government should "converse with each other on matters of vital common interest,"[121] and Justice Kennedy, dissenting in *Blakely v. Washington*,[122] applied this cooperation to the sentencing process, stating, "Constant, constructive discourse between our courts and our legislatures is an integral and admirable part of the constitutional design . . . . Sentencing guidelines are a prime example of this collaborative process."[123]

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114. Letter from Judge Stewart Dalzell, U.S. Dist. Court for the E. Dist. of Pa., to Susan C. Bucklew, Chair, Advisory Comm. on Fed. Rules of Criminal Procedure 1 (Nov. 15, 2005), *available at* http://www.uscourts.gov/rules/CR%20Comments%202005/05-CR-006.pdf.

115. *Id.*

116. *Id.*

117. *Id.*

118. *See generally* Chanenson, *supra* note 11 (detailing the evolution of federal criminal sentencing).

119. United States v. Allison, 447 F.3d 402, 406 (5th Cir. 2006).

120. Chanenson, *supra* note 11, at 175.

121. *Id.* at 175–76 (citing Mistretta v. United States, 488 U.S. 361, 408 (1989)).

122. Blakely v. Washington, 542 U.S. 296 (2004).

123. Chanenson, *supra* note 11, at 175 n.2 (quoting *Blakely*, 542 U.S. at 326 (Kennedy, J., dissenting)).

The Court's application of the Constitution to sentencing in *Apprendi v. New Jersey*,[124] *Blakely*, and *Booker* offers refreshing possibilities for reevaluating the sentencing system. In fact, these holdings "offer a rare opportunity for reassessing and recommitting to the good principles and bipartisan spirit that shaped the SRA. Congress can learn from years of experience and commentary on the Federal Guidelines system and from guidelines systems in many states . . . ."[125] Ultimately, post-*Booker* sentencing changes largely rest in the hands of Congress. Justice Breyer even conceded, "Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice."[126] Nevertheless, cues from sources like the courts, the Advisory Committee, and the public remain important for any further congressional action in sentencing.[127] Mindful of § 3553(a)(2)'s four essential purposes of retribution, deterrence, incapacitation, and rehabilitation,[128] these entities continually work to clarify details and set the stage for congressional action.

With proposed Rule 32(h),[129] the Advisory Committee has assisted congressional action in sentencing by elegantly crafting a rule that melds diametric post-*Booker* viewpoints into a workable solution. Proposed Rule 32(h) provides for uniformity consistent with the congressional desires underlying the Sentencing Guidelines. Moreover, proposed Rule 32(h) conforms to the constitutional requirements set forth in *Booker* and *Burns*, even affording additional Fifth Amendment due process protection. Finally, proposed Rule 32(h) affords clarity to the post-*Booker* confusion of sentencing and buttresses the idea of reasonableness presented in *Booker II*. In short, proposed Rule 32(h) is a pragmatic, guiding step for future congressional action. It finesses a rare and valuable post-

124. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

125. Weisberg & Miller, *supra* note 10, at 2.

126. United States v. Booker, 543 U.S. 220, 265 (2005).

127. It is worthwhile to note that "sentencing law and policy reflect the decisions of many actors . . . changes in rules, procedures, or decisions by one actor can have a hydraulic impact on other actors and . . . responses by those actors are not always predictable." Weisberg & Miller, *supra* note 10, at 20–21.

128. *See generally* Harmelin v. Michigan, 501 U.S. 957 (1991) (discussing these four penal goals).

129. *See supra* note 79 and accompanying text.

Booker blend of congressional desires with constitutional mandates alongside clarity and reasonableness.

A. Congressional and Constitutional Notes

Reconciling the congressional desire for uniformity with the constitutional aspects of the *Booker* decision is difficult at best.[130] The notice requirement of proposed Rule 32(h) nonetheless satisfies congressional desires for uniformity in sentencing, complies with constitutional mandates, and furthers fairness and due process.

First, proposed Rule 32(h) bolsters the congressional goal of sentencing uniformity by better ensuring the fairness of a non-Guidelines sentence or a sentence departing from the Guidelines. Both the majority and the dissenters in *Booker II* agreed that Congress intended to create uniformity in sentencing.[131] By requiring notice for any sentence imposed outside of the Guidelines, regardless of whether it is characterized as a variance or departure, Rule 32(h) adds an extra check on the judicial discretion permitted by *Booker*. Rule 32(h) ensures that courts more fairly consider all sentencing factors of § 3553(a) in the adversarial process and that courts reasonably justify sentences outside of the Guidelines. Through these checks, Rule 32(h) promotes the congressional goal of uniformity.

Second, proposed Rule 32(h) satisfies constitutional demands. As the Court has stated, "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them."[132] Thus, Rule 32(h) must comply not only with the demands of *Booker* but also with the prior demands of *Burns*. The constitutional debate surrounding Rule 32(h) primarily emerges from the incompatibility of *Booker II* with *Burns*. Though the Court shaped the *Burns* decision around mandatory Guidelines, *Booker II* implemented advisory Guidelines. Decided at different times under different sentencing systems, the *Burns* and *Booker* decisions are not entirely reconcilable. Nevertheless, discussing and formulating Rule

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130. *See* Weisberg & Miller, *supra* note 10, at 8 ("Booker undermines the constitutional legitimacy of rigid, judicially determined Guidelines . . . ."); *see also* Bissonnette, *supra* note 19, at 1534 ("Indeed, it is difficult to craft a role for the Guidelines that embraces congressional intent while following Booker's Sixth Amendment holding. Although it seems that the remedial majority aimed to carve out a niche between indeterminate sentencing and a mandatory Guidelines system, this middle ground, as one scholar has noted, may not actually exist.").

131. Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 749 (2006).

132. Miranda v. Arizona, 384 U.S. 436, 491 (1966).

32(h) requires respecting the policies and mandates of both *Burns* and *Booker*.

The proposed version of Rule 32(h) complies with the precedents of *Burns* and *Booker*, adequately balancing the mandates of the two Supreme Court opinions. The current draft of Rule 32(h) eliminates the mandatory nature of the Sentencing Guidelines as directed by *Booker*. The subheading change from "Notice of Possible Departure from Sentencing Guidelines" to "Notice of Intent to Consider Other Sentencing Factors" synchronizes the rule to *Booker* by "removing the language that (now) incorrectly gives exclusive focus to the guidelines."[133]

Though the revised subheading admittedly might suggest the primacy of the Guidelines, the language simply reflects the reality of the sentencing system. All of the courts of appeals require a Guidelines calculation,[134] and this calculation is the only § 3553(a) factor with a numerical value.[135] Moreover, as of March 2006, the United States Sentencing Commission reported that 85.9 percent of post-*Booker* federal cases resulted in sentences within the Guidelines range or below the Guidelines range with government sponsorship; 62.2 percent of those cases used sentences actually within the Guidelines range.[136] More importantly, only 1.6 percent of federal cases after *Booker* applied sentences above the Guidelines range, meaning both upward departures and variances.[137] "[T]he defendant, defense counsel, and the prosecutor rely first and foremost on the guidelines in making critical decisions, such as whether or not to plead guilty and if so, on what terms."[138]

This is especially true for the defendant. If courts generally sentence above the Guidelines range in less than 2 percent of cases, a sentence within or below the Guidelines range seems a particularly reasonable expectation on the part of the defendant and the defendant's counsel. Because judges are required to calculate the

133. NACDL Letter, *supra* note 107, at 5.

134. Chanenson, *supra* note 11, at 179.

135. *See* Sands Letter, *supra* note 108, at 1 ("Of all of the statutory factors courts must now consider, only the guideline range has a number attached to it.").

136. U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 46, 62 (2006), *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf.

137. *Id.* The government sponsored an additional 23.7 percent of sentences below the Guidelines range. *Id.*

138. Sands Letter, *supra* note 108, at 1.

Guidelines range and to consider the range calculated, components of the Guidelines remain highly influential.[139] Although *Booker* does not specifically articulate the primacy of the Guidelines, *Booker II* requires justification for sentences diverging from the Guidelines.[140] An assumption of a Guidelines or lower sentence is thus rational, particularly for defendants. Proposed Rule 32(h) therefore complies with the *Booker* decision in the most practical manner.

In addition to complying with *Booker*, proposed Rule 32(h) also incorporates the directives of the *Burns* decision. *Burns* remains good law, and, given that Rule 32(h) directly implements that decision, the fundamental aspects of Rule 32(h) must stay intact. Some courts of appeals argue that the advisory nature of the Guidelines automatically provides defendants notice of any sentence outside of the Guidelines so long as the factors considered are the same as those in § 3553(a),[141] but these courts disregard the *Burns* holding and its important element of fairness. Of course, some tweaking of Rule 32(h) is necessary in light of *Booker*, but only slight nuances and the suggestion of the mandatory nature of the Guidelines must be adjusted to bring Rule 32(h) into line with the *Booker* decision.

The *Burns* holding, although decided when the Guidelines were mandatory, still established fundamental principles for sentencing, which should not be swept under the rug of *Booker* complications. Citing the U.S. Sentencing Commission Guidelines Manual, the *Burns* Court stated, "When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information."[142] Even before the existence of Rule 32(h), the Court held that Rule 32 "provide[d] for focused, adversarial development of the factual and legal issues relevant to determining the appropriate Guidelines sentence."[143] In other words, Rule 32 contained an implicit notice requirement under the mandatory Guidelines regime. The same concept of fair adversarial proceeding

139. Weisberg & Miller, *supra* note 10, at 18.

140. Chanenson, *supra* note 11, at 181.

141. *See, e.g.*, United States v. Vampire Nation, 451 F.3d 189, 196 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 424 (2006) ("Because defendants are aware that district courts will consider the factors set forth in § 3553(a), we believe the element of 'unfair surprise' that *Burns* sought to eliminate is not present.").

142. Burns v. United States, 501 U.S. 129, 133 (1991) (citing U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. (1990)) (emphasis omitted).

143. *Id.* at 134.

present under a mandatory Guidelines system is present under an advisory Guidelines system.[144] The Second Circuit substantiated this notion in *United States v. Anati*,[145] stating, "In *Burns*, the Supreme Court was concerned not only with unfair surprise, but with the facilitation, through notice, of adversarial testing of factual and legal considerations relevant to sentencing. Notice permits the parties to focus their attention on the considerations upon which the resulting sentence will rest."[146] Other circuits agree that the underlying principle of *Burns*, requiring notice of upward departures or variances, should remain in place.[147]

Finally, proposed Rule 32(h) dispels any due process concerns regarding a defendant's notice requirement at sentencing. This version of Rule 32(h) strengthens the often-neglected Fifth Amendment jurisprudence surrounding the sentencing process.[148] Although some courts such as the Fourth Circuit consciously address due process at sentencing,[149] other courts, including the Third, Seventh, and Eleventh Circuits, "tak[e] advantage of the Fifth Amendment void left by Booker to erode the few procedural protections defendants enjoy at sentencing."[150]

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause but . . . at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the

144. *See* Sands Letter, *supra* note 108, at 1 (urging the Rules Advisory Committee to propose an amendment to Rule 32(h) that "would require courts to give reasonable notice when contemplating a sentence outside the guideline range").

145. United States v. Anati, 457 F.3d 233 (2d Cir. 2006).

146. *Id.* at 237 (internal citation omitted).

147. *See* United States v. Evans-Martinez, 448 F.3d 1163, 1167 (9th Cir. 2006) (noting that without affording a defendant the right to comment on an upward departure, "a critical sentencing determination [could] go untested by the adversarial process" (quoting *Burns*, 501 U.S. at 137)); United States v. Davenport, 445 F.3d 366, 371 (4th Cir. 2006) ("[N]either the defendant nor the Government 'is in a position to guess when or on what grounds a district court might depart' or vary from the guidelines." (quoting *Burns*, 501 U.S. at 136–37)).

148. The Court's Fifth Amendment jurisprudence lags behind its Sixth, and the lack of procedural protections for defendants at sentencing undercuts Sixth Amendment advances. In fact, the leading case concerning due process limits at sentencing is the 1949 decision in *Williams v. New York*, 337 U.S. 241 (1949). Anne E. Blanchard & Sarah G. Gannett, *Fifth Amendment Protections at Sentencing: The Next Logical Step After Booker*, 18 FED. SENT'G REP. 258, 258 (2006).

149. *Davenport*, 445 F.3d at 371.

150. Blanchard & Gannett, *supra* note 148, at 258.

nature of the case."[151] Notice and the opportunity to be heard may be implemented in a number of ways, and the requirements of due process demand interpretation by the courts.[152] To clarify procedural due process, the Court propounded a balancing test in *Mathews v. Eldridge*.[153] This three-part test analyzes the interest affected, the risk of erroneous deprivation of that interest through the procedures used, and the government's interest.[154]

The dissenters in *Burns* applied the *Mathews* test to the upward Guidelines departure.[155] As to the first step, the dissenters conceded that a defendant's interest in receiving a sentence not higher than the upper limit of the Guidelines was clearly substantial.[156] In analyzing the second part of the *Mathews* test, however, the dissenters concluded that "both the risk of error under the procedures already required and the probable value of a further notice requirement are sufficiently low that the current sentencing scheme passes constitutional muster."[157]

Booker complicated procedural protections, countering the argument of the *Burns* dissenters that existing processes satisfy protective due process requirements.[158] First, the opportunity to address the court at the sentencing hearing is inadequate as a procedural protection if the defendant or the government has no way of knowing what issues to prepare.[159] The *Burns* majority agreed, "'Th[e] right to be heard has little reality or worth unless one is informed' that a decision is contemplated."[160] The Court further

151. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1037 (2d ed. 2005) (providing an overview of procedural due process requirements).

152. CHEMERINSKY, *supra* note 151, at 1037.

153. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

154. *Id.* at 335 ("First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

155. Burns v. United States, 501 U.S. 129, 148–53 (1991) (Souter, J., dissenting).

156. *Id.* at 149.

157. *Id.* at 150.

158. *Id.* at 153–54.

159. Sands Letter, *supra* note 108, at 1–2; *see also* United States v. Anati, 457 F.3d 233, 235–36 (2d Cir. 2006) (detailing the importance of fair, adversarial proceedings).

160. *Burns*, 501 U.S. at 136 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

stated, "At best, . . . parties will address possible *sua sponte* departures in a random and wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative."[161] Second, the current standard of reasonableness for appellate review creates a quandary for appellate courts and provides further confusion.[162] Justice Scalia, dissenting in *Booker*, disparaged the coherence of the reasonableness standard for appellate review, describing it as "positively Delphic."[163] An uncertain standard, such as the reasonableness standard for appellate review of sentencing, provides little reassurance of adequate procedural due process.

On the value of notice itself, the dissenters in *Burns* noted, "Because a defendant thus has no need for evidentiary litigation, he has no need for notice of judicial intentions in order to focus the presentation of evidence."[164] Given the broader spectrum of judicial discretion post-*Booker* and the constitutional demand that "parties have an adequate opportunity to present relevant information,"[165] notice plays an even more important role during the post-*Booker* sentencing process. Foreseeing every possible factor that a judge might consider under § 3553(a) is impossible,[166] and providing some warning of elements that need preparation before advocacy seems reasonable.

The third step of the *Mathews* test examines the government interest in having a notice requirement at sentencing.[167] Here, it is worthwhile to emphasize that the notice requirement of Rule 32(h) covers both upward and downward departures or variances.[168] Particularly given the more frequent occurrence of below-Guidelines sentencing,[169] the government might also appreciate a notice

161. *Id.*

162. *See generally* United States v. Booker, 543 U.S. 220, 303 (2005) (Scalia, J., dissenting) (criticizing the standard of reasonableness for appellate review).

163. *Id.* at 311.

164. *Burns*, 501 U.S. at 152 (Souter, J., dissenting).

165. *Id.* at 133 (citing U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. (1990)).

166. *Id.* at 136.

167. Matthews v. Eldridge, 424 U.S. 319, 343–47 (1976).

168. *See supra* note 79 and accompanying text (applying Rule 32(h) to both upward and downward departures and variances).

169. *See* U.S. SENTENCING COMM'N, *supra* note 136, at 46–47 (providing statistics demonstrating more downward departures and variances than upward departures and variances).

requirement at sentencing so that it can adequately prepare arguments against a downward departure or variance. In *United States v. Walker*, the government conceded that "due process concerns may still require a district court to provide notice and opportunity to be heard on any contemplated departure or imposition of a non-Guideline sentence."[170] Despite the government's due process concerns and desire to withdraw its argument detailing the inapplicability of Rule 32(h) to post-*Booker* sentences outside of the Guidelines, the Seventh Circuit simply noted and dismissed the government position, refusing to change its view on Rule 32(h).[171] Similarly in *United States v. Anati*:

> [T]he Government indicated its agreement with Anati's position that the District Court was required to give notice prior to imposing a non-Guidelines sentence. It further conceded that, in the circumstances of this case, "the failure to give such notice was not harmless and that therefore . . . the case should be remanded to the District Court for resentencing."[172]

The government understandably might support the presence of a notice requirement during sentencing, and any *Mathews* concern about government disagreement wanes.

Though courts and scholars often tiptoe around directly employing the due process analysis to notice of a departure or non-Guidelines sentence, applying the *Mathews* test demonstrates that such notice is a necessary and realistic component of due process at sentencing. Thus, notice under Rule 32(h) given at sentencing is an essential element of procedural due process.

B. Clear Rhythms

Proposed Rule 32(h) traverses beyond merely satisfying varying congressional and constitutional demands. The suggested rule also provides rare clarity to the sentencing process by requiring notice both for sentences departing from the Guidelines and for sentences varying from the Guidelines. The rule, taking into account the lower courts' disagreements over terminology, incorporates both variances,

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170. United States v. Walker, 447 F.3d 999, 1007 n.7 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 314 (2006).

171. *Id.*

172. United States v. Anati, 457 F.3d 233, 236 n.1 (2d Cir. 2006) (quoting Letter from David C. James, Assistant U.S. Attorney, to Roseann B. MacKechnie (Apr. 12, 2006)).

or in the language of the rule itself, non-Guidelines sentences and departures from Guidelines ranges.[173] In other words, the rule eliminates the possibility that a court will use a terminological distinction to avoid providing notice for sentences that use the § 3553(a) factors but do not stay within the Guidelines range. Implementing the revised version of Rule 32(h) provides lower courts with clear, explicit directives that require providing notice to defendants at sentencing if a court considers *any* departure or variance. Further, the most recent version of the rule, proposed by the Sentencing Commission, narrows what constitutes notice by specifically requiring identification of information in the PSR or prehearing submission that could form the basis for a departure or variance from the Guidelines range.[174] By abolishing confusing semantics and adding more specific requirements, the terminology in proposed Rule 32(h) generates additional clarity in the post-*Booker* world of sentencing.

C. The Reasonable Melody

In assessing appellate review of sentences under the new sentencing regime, *Booker II* instituted a reasonableness standard.[175] Though facing harsh criticism regarding the ambiguity surrounding reasonableness, Justice Breyer nonetheless concluded that the Court "must view fears of a 'discordant symphony,' 'excessive disparities,' and 'havoc' . . . with a comparative eye."[176] In fact, Breyer dubbed the reasonableness underscored in *Booker II* as practical and "not foreign to sentencing law."[177] Proposed Rule 32(h) provides a small illustration of exactly what Breyer meant by reasonableness in the context of sentencing. Proposed Rule 32(h) supports congressional intent, meets constitutional requirements, and adds clarity to sentencing. Most importantly, proposed Rule 32(h) is fair to defendants, the government, and courts alike.

Consider the following cases. In the Northern District of Texas, a defendant pled guilty to illegal reentry following deportation.[178] The

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173. *See supra* note 79 and accompanying text (illustrating the narrowed scope of Rule 32(h)).

174. Letter from Judith W. Sheon, *supra* note 79, at 2.

175. United States v. Booker, 543 U.S. 220, 261–62 (2005).

176. *Id.* at 263 (quoting *id.* at 313 (Scalia, J., dissenting)).

177. *Id.* at 262.

178. Sands Letter, *supra* note 108 (discussing an unpublished decision).

court calculated a Guidelines range of twenty-one to twenty-seven months. The PSR, however, indicated several prior convictions for driving while intoxicated and one dismissed charge for sexual assault of a minor.[179] Lacking any mitigating or aggravating factors supporting a Guidelines departure, the judge imposed a sentence of 120 months without any notice of an upward consideration to the defendant.[180] The judge justified his decision by stating that the defendant would have been convicted of sexual assault of a minor if the minor had not moved back to Mexico. The PSR contained no specific information about the sexual assault, and the judge failed to say where he obtained his information. With no notice that such information would be introduced at sentencing, the defendant had no opportunity to contest the consideration of the sexual assault charge.[181] Similarly, a court in Alabama sentenced a mentally retarded defendant to life in prison when the Guidelines range for the crime suggested only a period of years.[182] The government introduced, without notice, a prison disciplinary report detailing an altercation between the defendant and a prison guard. The judge at sentencing subsequently based his decision to upwardly depart from the Guidelines on this report. Again, the defendant, with no notice that the report would be introduced at sentencing, had no opportunity to challenge the presentation or the validity of the report.[183]

Although these cases may be rarities in the criminal justice system given the miniscule percentage of federal cases that result in above-Guidelines sentences post-*Booker*, they nevertheless intimate an undeniable sense of unfairness. The implementation of proposed Rule 32(h) and the added procedural protection of notice might have prevented these defendants from receiving exorbitant sentences based on unexpected information. At the very least, with Rule 32(h) steadfastly in place, these defendants would have had a full and fair opportunity to challenge the unanticipated information upon which their sentences were based.

179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* (discussing an unpublished decision).
183. *Id.*

Some courts suggest that the notice requirement of proposed Rule 32(h) unnecessarily complicates the sentencing system.[184] On the contrary, the notice requirement is very reasonable within the scheme of sentencing. Concerns like those of Judge Dalzell, which posit excessive procedural costs, exaggerate the effect that Rule 32(h) would have on courts.[185] According to the U.S. Sentencing Commission, upward departures or variances from the Guidelines occur in less than 2 percent of all sentences, and downward departures or variances not sponsored by the government comprise only around 12.5 percent of cases.[186] These statistics might lead to the suggestion that 14.5 percent of cases would potentially require a continuance based on a requirement for outside-Guidelines notice at sentencing. In the context of Rule 32(h), however, these numbers acquire slightly different meanings. First, at least four circuits have already decisively implemented an outside-Guidelines notice requirement at sentencing,[187] meaning Rule 32(h) would not affect the dockets of cases in these circuits. Second, many appellate courts currently have notice requirements for Guidelines departures, but not for Guidelines variances.[188] A substantial proportion of the cases identified by the Sentencing Commission would not be affected by proposed Rule 32(h) and thus would not significantly affect the cost of current sentencing.[189] In fact, disregarding sentences constituting actual departures from the Guidelines, only about 11.7 percent of sentences could possibly require a continuance.[190] Considering the

184. *See supra* notes 114–17 and accompanying text (outlining Judge Dalzell's criticisms of proposed Rule 32(h)).

185. *See supra* notes 114–17 and accompanying text (same).

186. *See supra* note 137 and accompanying text (showing sentencing statistics).

187. *See supra* Part II.A (discussing the circuits supporting post-*Booker* Rule 32(h) notice).

188. *See supra* note 109 and accompanying text (clarifying the typical differentiation between a departure and a variance).

189. The Sentencing Commission percentages can be separated into departures and variances. Given that a number of the circuits suggest that notice at sentencing is fair for sentences using information outside of the § 3553(a) factors, only the statistics for variances might constitute any sort of real procedural complication for the judiciary.

190. Below-Guidelines departures not related to Booker or § 3553(a), and therefore considered departures, equal 2.2 percent of cases. Above-Guidelines departures not related to Booker or § 3553(a), and therefore also considered departures, equal 0.2 percent. The remaining statistics represent the variances and sentences outside of the Guidelines for unspecified reasons. Addition of these numbers yields approximately 10.3 percent for downward variances or unspecified sentences and 1.4 percent for upward variances or unspecified sentences; thus, approximately 11.7 percent of the total sentences are variances or unspecified. U.S. SENTENCING COMM'N, *supra* note 136, at 62.

post-*Booker* application of Rule 32(h) in a number of circuits and discounting the cases of Guidelines departures, even fewer cases might actually require additional procedural costs, hearings, or continuances.

Moreover, slight inconveniences to the court pale in comparison to the meaningful principles of fairness and justice that Rule 32(h)'s notice requirement incorporates into sentencing. In *Booker*, Justice Stevens wrote, "[T]he interest in fairness and reliability protected by the right to a jury trial . . . has always outweighed the interest in concluding trials swiftly."[191] Similarly, the interests in fairness and reliability protected by reasonable notice at sentencing outweigh the court's interest in greater efficiency for what probably amounts to much less than 11.7 percent of cases. The holding in *Burns* substantiates this notion.[192] Fairness to a defendant and due process outweigh any concern over possible continuance or complication of the sentencing system for the courts.

In the end, proposed Rule 32(h) is a perfectly reasonable implementation of increased fairness at sentencing. As such, it will help ensure the reasonableness of sentencing suggested by Justice Breyer in *Booker II*.

CONCLUSION

With Justice Scalia's "discordant symphony" playing in the background, judges, legislators, and commentators have worked to refine the post-*Booker* world of sentencing. Creating an appropriate response to *Booker* requires thoughtfulness and patience,[193] not "knee-jerk, quick-fix solutions."[194] In the meantime, the *Booker* Court "has fashioned a reasonable remedy that will allow courts to conduct business until Congress decides how to act."[195] While the sentencing system operates under *Booker*, the interim before congressional action allows the opportunity for extensive commentary and thoughtful approaches to sentencing.

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191. United States v. Booker, 543 U.S. 220, 244 (2005).

192. Burns v. United States, 501 U.S. 129, 137–38 (1991).

193. Walter, *supra* note 69, at 683.

194. Gibson, *supra* note 53 (quoting Stephen A. Saltzburg, George Washington University law professor).

195. Savage, *supra* note 49.

Although this Note does not reveal any perfect solution to the complications of sentencing, it does offer a workable solution to one of a myriad of post-*Booker* dilemmas. With any change to the composition of Congress or to the Supreme Court, the outcomes of congressional action or the resultant judicial checks on changes to the sentencing system are enigmatic. In accordance with *Booker*, proposed Rule 32(h) instills constitutional compliance, clarity, and a sense of reasonableness in sentencing. Given the seemingly incompatible *Booker* majorities, the divergent responses to the *Booker* opinion, and the confounded jurists and legislators approaching the *Booker* mandates, adopting proposed Rule 32(h) would bring an encouraging measure of harmony to the federal sentencing system.